IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-937

J-R DISTRIBUTORS, INC., HOWARD C. FRANK, SAMUEL KRAVITZ, ALBERT THOMAS DUANE, and JAMES MICHAEL TIDYMAN, Petitioners

v.

STATE OF WASHINGTON, Respondent

BRIEF IN OPPOSITION
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON

The Respondent accepts the statement of the Petitioner as to the OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED, and STATEMENT OF THE CASE.

QUESTIONS PRESENTED

1. Whether the "authoritative construc-ion" of the Washington State obscenity law RCW 9.68.010) by the Court below renders that aw constitutional under the First and Four-eenth Amendments and Miller v. California, 13 U.S. 15 (1973).

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4. Whether the publications Answers, Volume ne Number One and Sex Between Humans and Animals, olume Two, are protected against State action by he First and Fourteenth Amendments (petition of -R Distributors, Inc., and Howard C. Frank only).

ARGUMENT

1. *The "authoritative construction" of the Washington State Obscenity Law (RCW 9.68.010) by the Washington State Supreme Court renders that law constitutional under the First and Fourteenth Amendments and Miller v. California, 413 U.S. 15 (1973).*

In Miller v. California, 413 U.S. 15, 37 L.Ed. 2d 419, ___ S. Ct. ___[1973], the court was dealing with a specific state statute which encompassed the previous requirements of the Roth-Memoirs test. Roth v. United States, 354 U. S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 [1957]; Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed. 2d 1, 86 S.Ct. 975 [1966]. This court stated in vacating and remanding the case for further proceedings:

> "The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion."

Petitioner contends that the "construction" of Washington law by the State Supreme Court is not in accord with Miller, because it did not limit the scope of the law to specifically define sexual conduct. However, this contention is not upheld by the

opinion itself which refers definitively to the opinions of this court and applies them specifically to the Washington situation. The Washington State Supreme Court stated in its opinion the following (Petitioners' Brief for Writ of Certiorari, Appendix p. 17):

> "[11, 12] In Roth the United States Supreme Court considered carefully whether the word 'obscene' is unconstitutionally vague and found that it was not. Accord, Mishkin v. New York , 383 U.S. 502, 16 L.Ed. 2d 56, 86 S.Ct. 958 [1966]. According to Roth the only requirement is that the language convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Roth v. United States, 354 U.S. 476, 491, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 [1957]. See also State v. Oyen, 78 Wn.2d 909, 480 P.2d 766 [1971] [judgment vacated and case remanded on other grounds, 408 U.S. 933 [1972]. We hold that the word 'obscene', as used in RCW 9.68.010, is not unconstitutionally value when considered within the light of the Roth-Miller test. According to the Roth-Miller test the scope of regulation is confined to works which depict or describe sexual conduct.[1] A state offense must also be

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1. As stated in Miller v. California, 41 U.S.L.W. 4925, 4927-28 (June 21, 1973), the conduct must be specifically defined by the

limited to works which, taken as a whole, appeal to the prurient interest in sex, portraying sexual conduct in a way that is patently offensive, and which taken as a whole does not have a serious literary artistic, political, or scientific value.[2] As thus authoritatively construed by this court, RCW 9.68.010 is sufficiently definite, when measured by common understanding and practice.[3]

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applicable state law as written, or as authoritatively construed.

2. We authoritatively construe RCW 9.68.010 in the light of, and as limited by, the Roth-Miller test. In short, quoting from Miller v. California, supra at 4928, the basic guidelines for the trier of fact must be: "(a) whether 'the average person, apply contemporary community standards' would find that the work, taken as a whole, appeals to the pruient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

3. In this regard attention is directed to United States v. 12 200-Ft. Reels, 41 U.S.L.W.

Photographs, pictures and drawings which portray in a patently offensive way sexual conduct as ultimate sexual acts, normal or perverted, actual or simulated, or which depict acts of masturbation, fellatio, cunnilingus, lewd exhibition of the genitals and sexual relations between humans and animals are 'obscene', if, taken as a whole, the subject matter does not have a serious literary, artistic, political or scientific value. No such value has been demonstrated here."

4961 (U.S. June 21, 1973), in which the United States Supreme Court, commenting upon a federal statute, using many words similar to those in RCW 9.68.010, had this to say in footnote 7, page 4963:

We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised . . ." and "a construction of the statute is fairly possible by which the question may be avoided." . . . If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that

The respondent would contend that the application y the Washington Supreme Court of the opinions of his court to the situation presented herein is an uthoritative construction" of the Washington State aw consistent with the First and Fourteenth Amend-ents of the United States Constitution and Miller . California, supra.

This Court in fact stated at 37 L.Ed. 2d 430 n the Miller case that:

> "We do not hold, as Mr. Justice Bren-an intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be ade-quate. See United States v 12 200-Ft. Reels Film, ___US ___ [p 7, n 7], 37 L Ed 2d 507, ___ S Ct ___ [1973]."

Furthermore, this Court has recognized the fact y its statement in Miller v. California that the efinition of the word obscenity has not always been precise as some would argue that it should be. stated in the Miller case at 37 L.Ed. 2d 433:

> "As Mr. Justice Brennan stated for the Court in Roth v. United States, supra, 354 US, at 491-492, 1 L Ed 2d 1498 [1957].

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ecific "hard-core" sexual conduct given as amples in Miller v. California . . . talics ours.)

"'Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '"... [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. ..." United States v. Petrillo, 332 US 1, 7-8 [91 L Ed 1877, 67 S Ct 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Furthermore, this Court held in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed. 2d 446, ____S. Ct. ____(1973), at 37 L.Ed. 2d 464:

"In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult

> Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v California, supra, ___US, at ___, 37 L Ed 2d 431."

Thus the Washington State Supreme Court did in fact construe the obscenity law consistently with the First and Fourteenth Amendments and Miller v. California, supra.

It seems, however, that petitioners' objection in question number 1 to this Court would not apply to his particular case, but rather to cases in the future which are brought under the Washington State obscenity statute as now authoritatively construed by the State Supreme Court. In other words, if the Washington State Supreme Court has not properly construed that statute in accordance with Miller v. California, those cases brought in the future thereunder could not be held valid by virtue of the fact that the individual would not have received fair notice from the Washington State Supreme Court as to specifically what type of material was proscribed. Respondent contends that this issue is not available to the petitioner in this case as a result of the application by the State Supreme Court of the previous Roth-Memoirs test to the material contained therein, and further, a determination that this material would also be considered obscene under the new Roth-Miller test.

2. The Due Process Clause of the Fourteenth Amendment was not violated in this case by virtue of the fact that the State Court under the State law existent at the time of the alleged criminal acts, and as construed and applied at the trials, incorporated the Memoirs test, and further, determined that the materials would also be obscene under the new Miller construction.

Petitioners cite the case of Bouie v. Columbia, 378 US 347, 12 L.Ed. 2d 894, 84 S. Ct. 1697 (1964), in arguing that no court by judicial enlargement of a criminal statute may in effect determine that a law shall apply ex post facto with a more liberal interpretation of that statute. This court stated in the Bouie case at 12 L.Ed. 2d 899:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v United States, 314 US 306, 311, 86 L ed 226, 231, 62 S Ct 237, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice

in such an enactment cannot 'be
*[378 US 353]
cured in a given *case by a construction in that very case placing valid limits on the statute' for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact."

This Court stated in the Bouie case at 12 L.Ed. 2d 899:

". . . An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' Calder v Bull, 3 Dall 386, 390, 1 L ed 648, 650. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from Achieving precisely the
*[378 US 354]
*same result by judicial construction. . . ."

The Court also stated as the specific holding in the Bouie case at 12 L.Ed. 2d 901:

". . . There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drug store or the restaurant department. . . ."

It is clear that in this case the situation is entirely different from that presented to the Court in the Bouie case. Here it is a matter of the interpretation of the word "obscene" by the United States Supreme Court as that interpretation has progressed through the years. It may be true that the Miller decision will allow a more liberal test to be applied to specific materials in order to have a determination as to whether or not they are, in fact, "obscene". However, this doctrine of the law cannot be applied to a case in which the petitioner is involved unless this judicial determination or enlargement was in fact reverted to by the Washington State Supreme Court in order to hand down its opinion.

The Washington State Supreme Court was obviously aware of this doctrine in the opinion rendered as may be seen from the statement in that opinion appearing at p. 6 of the Appendix in Petitioners' Brief:

"Although the foregoing opinions of the United States Supreme Court have caused no change in the result reached

herein, it has been necessary to reevaluate and revise certain language."

Thereafter, the State Supreme Court, as they applied the test to the materials involved in this particular case, specifically referred to the test previous to the Miller decision, and the different result that might be reached as a result of that decision. For example, the Court stated at p. 11 of the Appendix to the Petitioners' Brief:

"[5] The three elements of the test must coalesce before material may be proscribed as 'obscene'. If, however, it can be said that material falls within the ambit of the test, it is 'obscene' and therefore does not come within constitutionally protected freedom of speech or press under the first and fourteenth amendments to the United States Constitution. Roth v. United States, supra; United States v. Reidel, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S. Ct. 1410 (1971); Miller v. California, supra. On the other hand, if it falls outside the Roth-Miller standard it is not legally 'obscene' and is entitled to protection of the First and Fourteenth Amendments even though it may be distasteful to some who view it. Roth v. United States, supra at 481-85; Miller v. California, supra."

With regard to the question presented by the petitioners concerning the vagueness of the statute and the fact that it only mentions the word obscene, the Court carefully considered this question and stated in its opinion at pages 17 through 19 in the Appendix to the Petitioners' Brief, as indicated.

The State Supreme Court again in a recognition of the difference between the tests, stated at p. 27 of the opinion in the Petitioners' Brief:

> "The materials viewed by the triers of fact and by the members of this court are, in each of the consolidated cases hard-core pornography in every sense of the term and as that expression is more fully discussed in Division II-C State v. Cox and State v. Rogoway, § 2. The materials go far beyond the contemporary community standards of this state relating to sex whether one considers the view of the average man under the former Memoirs test or the current Roth-Miller test."

Therefore, it can clearly be seen that the State Court was concerned with applying the Roth-Memoirs test to the case at hand, by virtue of the fact that that specific test was in force at the time of the purchase of the materials herein involved, while in addition recognizing the new Roth-Miller test.

The Court then takes up the question of the

previous test that the material must be "utterly without redeeming social value" in order to be determined obscene. After some extensive discussion with regard to the materials involved in these cases, the court concludes at p. 30 of the Appendix to the Petitioners' Brief:

> "Defendant's challenge is not well taken under either the former Memoirs test or the newly adopted test in Miller."

Additionally, the Court stated in reference to the exhibit speaking for itself at p. 30 of the Appendix to the Petitioners' Brief:

> "Nothing will be gained by a detailed restatement of testimony and evidence before the trier of fact. It is sufficient to say that considering the totality of the record in the relevant cases there was ample evidence to meet even the former Roth-Memoirs test of obscenity relied on by defendant. . . ."

The State Supreme Court then concluded with regard to the question of whether or not there was a viable definition of "obscene", at p. 31 of the Appendix to the Petitioners' Brief:

> "Defendant has disregarded the pronouncement of the United States Supreme Court in United States v. Reidel, 402 U.S. 351, 354, 28 L.Ed.

2d 813, 91 S. Ct. 1410 [1971]. Reidel makes it abundantly clear that Roth 'remains the law in this Court.' Thus, even under the Roth-Memoirs test, applicable at the time defendant's brief was written, there was a viable definition of 'obscenity.'"

Furthermore, at p. 33 of the Appendix to the Petitioners' Brief:

". . . [b] testimony was sufficient to meet the former Roth-Memoirs test as well as the present, less stringent, Roth-Miller test."

It can clearly be seen from these portions of the opinion, and those which will be cited later in the brief under questions number 3 and 4, that the Washington Supreme Court was indeed aware of the fact that it could not by judicial determination enlarge the definition of the word "obscene" to cover material which was not in fact encompassed prior to the Miller decision. Therefore the Court did not violate the provisions of Bouie v. Columbia, supra, in its determination of the State case to the petitioners.

3. *The Washington State Supreme Court did not violate the First and Fourteenth Amendments in determining the obscenity of publications comprised both of pictures and textual material, and in basing the obscenity upon the pictorial material which had no reasonable relationship to the text.*

Petitioners herein argue that the Washington State Supreme Court must consider the publications "as a whole" and therefore could not make the de- determination that the pictures involved in the publications did not reasonably relate to the text.

In making this argument, however, the peti- tioners fail to recognize that the same distinction was made by this Court in Kois v. Wisconsin, 408 U.S. 229, 33 L.Ed. 2d 312, 92 S. Ct. 2245 (1972).

In fact, the Washington State Supreme Court specifically discussed this matter in its opinion, as clearly indicated at p. 47 of the Appendix to the Petitioners' Brief:

> "[28] In reference to both 'Answers' and 'Sex Between Humans and Animals', defendants do not specifically argue that the mere presence of printed material which complies with the Roth-Memoirs test, automatically places a First Amend- ment protective mantle over accom- panying obscene pictures. However, a vague suggestion in that vein does seem to be made. We assume that a similar argument would be made under the Roth-Miller test. Such a position is without legal sanction. Kois v. Wiscon- sin, 408 U.S. 229, 33 L. Ed. 2d 312, 92 S. Ct. 2245 [1972], has devised a commonsense test which generally pro- vides that if pictures accompany text material, itself not considered obscene under the Roth test, the accompanying pictures which would otherwise

violate Roth will be protected by the First Amendment [1] if they are relevant to the theme of the article, [2] have a reasonable and rational relationship to the test, and [3] the text is not a mere vehicle for publication of the pictures. The court in Miller v. California, 41 U.S.L.W. 4925, 4928 [U.S. June 21, 1973], gave an example of illustrative material that would meet the Kois test: 'For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy.' The court, in Kois, also made the interesting observation, at page 231: 'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . .'

"As carefully noted in our review of 'Answers' and 'Sex Between Humans and Animals', the requisite reasonable and rational relationship between the printed material and pictures is nonexistent. The photographs are not relevant to the theme of the articles in which they appear. The articles and the books are merely vehicles for exhibiting the pictures.

"The pictures acquire no First Amendment protection by the sole fact of being included in or interspersed through text material that itself might be protected by the First Amendment under the Roth test. Kois v. Wisconsin, supra. Logically, the same would be true under the more specific, and current, Roth-Miller test. Obscene materials are not protected by the First Amendment. Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 [1957]; United States v. Reidel, 402 U.S. 351, 28 L. Ed. 2d 813, 91 S. Ct. 1410 [1971]. Thus, the pictures will not be protected by the First Amendment if they are obscene, and are not otherwise protected by the Kois rule."

The opinion had previously discussed the attempt at a relationship between the printed portion f the articles in the publication and the photoraphs contained therein. Page 45 of the Appendix o the Petitioners' Brief:

"There is absolutely no reasonable or rational relationship between anything in the printed portion of the article and the photographs contained therein. The photographs are not relevant to the article's theme unless logic

> can be tortured to make the connection relevant. A pseudo-relevance could be found only by reasoning that the article indicates pornographic pictures are legal in Denmark, although illegal here; thereafter, it would be necessary to reach the illogical conclusion that the pictures shown in the magazine, must, in this instance, be legal because they merely illustrate that which is legal in Denmark. In the legal profession this is referred to as 'bootstrapping.'"

The reason that the State Court referred to the act that the pictures must be tested standing alone as by virtue of their conclusion that they bore no easonable relationship to the text, and therefore id, in fact, "stand alone". Therefore the Court was ot in error in so considering this material.

It is clearly not necessary for this Court to eview the determination by a State Supreme Court hat particular material was obscene because of the act that under Kois v. Wisconsin, supra, the pictorial material therein did not bear a reasonable relaionship to the textual material. Therefore, it is lear under the test of this Court that the State upreme Court of Washington did, in fact, consider he material involved "as a whole".

4. The publications involved, "Answers", olume One Number One, and "Sex Between Humans

and Animals", Volume Two, are not protected against State action by the First and Fourteenth Amendments.

After an extensive discussion of the materials involved in the case of State v. J-R Distributors, Inc. and Howard C. Frank, beginning at p. 41 of the Appendix to the Petitioners' Brief, and ending at p. 52 thereof, the Court stated:

> "5. In conclusion, we hold that the pictures and photographs in 'Answers' and 'Sex Between Humans and Animals' are 'obscene' whether viewed in light of the rejected Memoirs test or the newly adopted Roth-Miller standards. In fact, they are 'hard core pornography'. We also hold, as indicated above, that there is no reasonable and rational relationship between the text or theme of the publications and the pictures or photographs contained therein. The text is a mere vehicle for the exhibition of obscene pictures. Thus, the fact that the pictures and photographs are combined with nonobscene text material does not clothe them with protection of the First Amendment."

It is seen that the State Supreme Court recog-ized the differences between the Roth-Memoirs test nd the newly adopted Roth-Miller standards. The

ate Court held that under either of these tests
e material involved was obscene, and therefore not
itled to the protection of the First Amendment.

Petitioners' contention that the material con-
ns serious informational and educational value
ut sex, and therefore was not obscene, was pre-
ted to the trial court and the State Supreme
rt as reasons for the proposition that under the
h-Memoirs test the material was not "utterly
hout redeeming social value". That same argument
ld now be presented to a Court on the basis of
third subdivision of the Roth-Miller test that
s particular material had "serious literary or
entific value". It is clear from the opinion of
Washington State Supreme Court that the Court
sidered both of those arguments and rejected them.

Therefore, contrary to the argument by the
itioners, the material was determined to be, in
t, "hard-core pornography", not having any value
tsoever, and not entitled to any protection of
Constitution of the United States, or any case
of this Court.

CONCLUSION

The decision of the Washington State Supreme
rt was correct on all the above matters and hence
petition should be denied. Moreover, the peti-
ners have not in any of their arguments raised
substantial constitutional questions of importance
ch would warrant granting the petition. Therefore,

the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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